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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 381.

UNITED STATES OF AMERICA, *Petitioner*,

v.

AMERICAN SURETY COMPANY, A CORPORATION, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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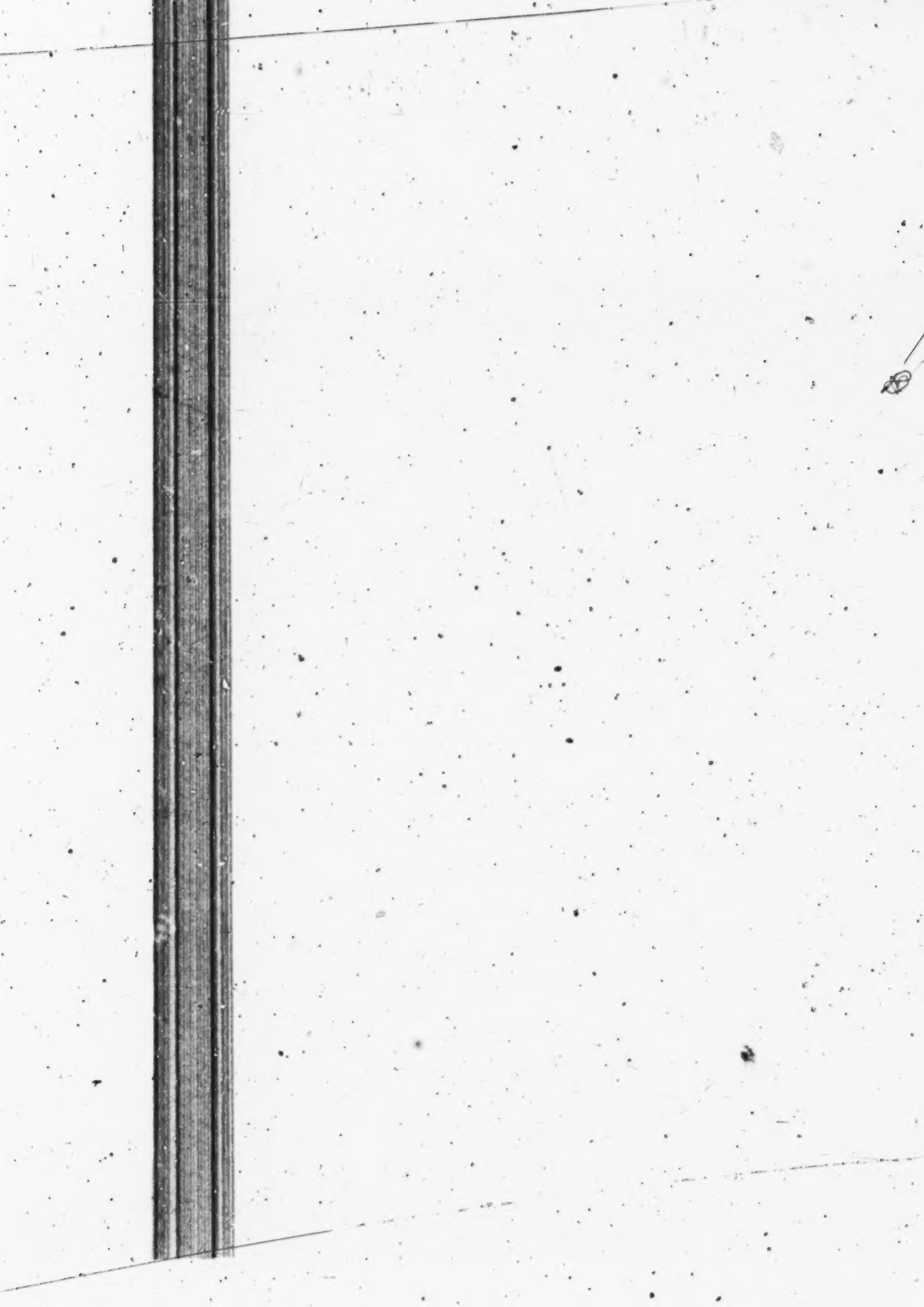

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Respondent opposes the petition for a writ of certiorari not only upon the ground that the decision of the Circuit Court of Appeals is a correct statement of the applicable law, but also for the reason that, under the rules and decisions of this Court, the instant case is not a proper one for the issuance of the writ. An understanding of the litigation will settle that the case involved here is not of general concern or public importance but that it involves

a question of interest only to the parties litigant. It will settle further that there is nothing but a simple question of contract interpretation involved and that the lower court has not only followed precedents in its decision that are found in the uniform decisions of the Federal courts but has construed plain language to mean what it says.

Petitioner's stated grounds for the issuance of the writ are limited to the contention (Page 7 of Petition) that the court below has decided an important question involving a provision of a widely-used standard form Government construction contract (a) in a manner contrary to the purpose of the provision and (b) of the statute requiring it, and also (c) to the administrative interpretation. Actually the statute mentioned is not involved at all in this litigation as will be pointed out later herein. The administrative interpretation of the contract is rather beside the point and has been for a long time as it is not in accordance with the language of the contract as the Federal courts have been holding uniformly for years. Consequently, the only ground upon which the Government in fact hinges its petition for the writ herein is that the court below has decided what Government counsel calls an important question. It will be plain from a consideration of the record that the real reason for the petition here is that Petitioner's counsel desires another hearing and that no question of importance is involved at all.

ARGUMENT.

(1) The Decision of the Circuit Court of Appeals Involves Only the Construction of the Language of a Contract and is Correct Under the Plain Contract Language and Constructions Thereof by the Federal Courts in Other Litigation Involving the Same Contract Form.

The Circuit Court of Appeals in its decision here involved has tersely said:

> "The inquiry (here) relates merely to the reach of a special stipulation agreed upon as a substitute for the ordinary mode of proving damages. By its very nature a stipulation for liquidated damages has no force save in the contingency made the subject of the special agreement. (Citing 15 Am. Jur., Damages, Paragraph 261, and Wise v. U. S., 249 U. S. 361.) To extend the stipulation to other contingencies by a process of reasoning or by analogy would amount to a rewriting of the contract."

Then the Circuit Court of Appeals said:

> "In what contingency, then, is delay here made compensable by the exaction of the stipulated sum? The sole contingency specified is 'if the Government does not terminate the right of the contractor to proceed'. The situation contemplated—or at any rate agreed upon—is one where the contractor, although failing to complete the work on time, is allowed to continue with it to completion or acceptance. In that event only, it was agreed a specific sum was recoverable in lieu of the damages actually sustained but thought incapable of proof. What the trial court did was to extend the agreement to a different situation, one in which it might well have been, but was not, agreed that the stipulation should govern."

Now the Government, through certiorari, would attempt to re-argue the simple question presented below, and this, too, in face of the fact that the Federal courts of the country which have had occasion to pass upon this form of con-

tract in other litigation are all in harmony and have uniformly construed the contract heretofore as did the Circuit Court of Appeals in the instant case. See the following authorities in this connection:

Fidelity Casualty Co. of N. Y. v. *United States*, 81 Ct. Cls. 495;
Maryland Casualty Co. v. *United States*, 93 Ct. Cls. 247;
Commercial Casualty Insurance Co. v. *United States*, 83 Ct. Cls. 367;
American Employer's Insurance Co. of Boston v. *United States*, 91 Ct. Cls. 231;
United States v. *Cunningham*, 125 F. 2d 28; 75 U. S. App. D. C. 95.

There are no cases to the contrary; and counsel for the Government err in the statement in the petition here (page 13) that the decisions of the lower courts are not in harmony. As to the Continental Casualty Co. case, mentioned by the Government (page 13), counsel for the Respondent in the case at bar certifies that he has personally examined the entire record that was before the Circuit Court of Appeals for the Fifth Circuit, and the point of contract construction involved here was not raised by the parties or determined there. The Government now concedes as much in its petition. Hence the case creates no lack of harmony in the decisions. The other cases mentioned by the Government are not apposite as the contract provisions considered are entirely different from the provision involved here.

What public importance can be attached to a question of simple contract construction? And in view of the uniform construction through the years by the Federal courts, supra, of the particular contract provision involved here, the question ceases to have any possible importance now in any event. The Government has heretofore accepted the construction placed upon this particular contract form in the above-cited cases in the Federal courts in that it did

not apply for certiorari to have them reviewed. What possible justification can be found for the application now for certiorari in the last of a line of uniform decisions when the earlier decisions were not questioned? If a question of construction of the plain language of a plain contract is to become an important question justifying certiorari, there will be no end to the litigation this Court will be petitioned to review. In the Magnum Import case (262 U. S. 159, 67 L. Ed. 922) this court said:

> "The jurisdiction to bring up cases by certiorari from the circuit court of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The Federal courts of appeal and the Court of Claims of the United States are in accord on the construction to be given to this particular form of contract. If the Government does not now like the construction that has been placed by the courts upon this contract form, it can change the language of the form so as to make it all inclusive hereafter. Certainly this condition does not give rise to a question of importance which it is in the public interest to have decided by this Court.

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(2) No Question of Federal Law or of Federal Statutory Construction is Involved Here.

As one of its specifications of error herein (page 5 of Petition), the Government urges that the court below erred in failing to hold that Section 21 of the Act of June 6, 1902,

and the long-established administrative practice of the Government under the contract article involved in this litigation required that such contract article be construed as the Government contends.

The statute mentioned is quoted in the appendix to the petition for the writ. So far as pertinent here it provides only that contracts entered into with the United States for the construction of public work, etc., shall contain a stipulation "for liquidated damages for delay." The statute does not specify what language shall be used nor that the contract drawn shall meet the claims of the Government in this case. Acting under that statute the form of contract here involved was drafted. It provides "for liquidated damages for delay", and the requirements of the statute were thus met. The fact that the contract by its plain terms and as construed by the courts does not extend to giving the Government liquidated damages where it terminates the right of the contractor to proceed thereunder and completes the contract work itself does not bring the statute into the case. The fault, if any there be, is in the language of the contract which the draftsman used. Therefore, it is plain that this specification of errors is without merit. The same argument applies to paragraph 3 of the specification of errors herein.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated at Billings, Montana, October 11th, 1943.

STERLING M. WOOD,
Attorney for Respondent.

DOUGLAS, OBEAR & CAMPBELL,
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Of Counsel.